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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

JOHN ROE,
Petitioner,

VS.

CALIFORNIA SUPERIOR COURT, COUNTY OF MARIN,

SHERRY DOE,
Real Party in Interest.

On Writ of Certiorari to the California Court of Appeal, First Appellate District, Division 4

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) Whether California Evidence Code section 621, which creates a presumption regarding the paternity of a child based on the marital status of the mother at the time of birth, is unconstitutional as a violation of the Due Process Clause and/or Equal Protection Clause of the United States Constitution, when the mother brings a paternity action against a man who is not her husband, and when the child does not join in such action?

(2) Whether an order requiring a third party defendant to submit to paternity blood tests, when Evidence Code section 621 applies, constitutes a violation of the defendant's Constitutional right of privacy and freedom from unreasonable search and seizure?

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PETITION FOR WRIT OF CERTIORARI

DECISION BELOW

The decision of the California Court of Appeal, First District, Division 4, is reported in the advance sheets at 202 Cal. App. 3d 234, 248 Cal. Rptr. 669 and is set forth in the Appendix at A-1- 9. The order of the California Supreme Court denying Petitioner's Petition for Review, and ordering the Reporter of Decisions not to publish the Court of Appeal opinion, is set forth in the Appendix at A-10.

JURISDICTION

The California Supreme Court denied Petitioner's timely Petition for Review on August 25, 1988. Petitioner invokes the Court's certiorari jurisdiction under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Fourteenth Amendment, United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Evidence Code section 621:

> (a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.
>
> (b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.
>
> (c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.
>
> (d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later

than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(e) The provisons of subdividion (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

(f) The notice of motion for the blood tests pursuant to subdivision (b) shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court. This requirement shall not apply to any case pending before the court on September 30, 1980.

(g) The provisions of subdivision (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980.

STATEMENT OF THE CASE

This case raises important issues concerning the constitutionality of California Evidence Code section 621, the same statute involved in *Michael H. and Victoria D. v. Gerald D.*, No. 87-746, which is presently before the Court. Petitioner ["John"] respectfully requests that the Court issue a writ of certiorari, to review this case in light of its adjudication of *Michael H.*

A. *Background.* On July 30, 1981 Respondent ["Sherry"] gave birth to a daughter, Sabrina. Sherry was then living with her husband, James, with whom she had another daughter two years earlier. Sherry and James had cohabited since their marriage in 1974, and they had continued to live together with the two girls in the summer of 1982. At that time, the parties separated, and Sherry assumed sole custody of the children.[1]

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[1] The Court of Appeal opinion states [Appendix A-3]: "John and Sherry lived together with her daughters at various times after James and Sherry separated. In October of 1983, John and Sherry commenced living together in a house that they selected together and John pur-

B. *Dissolution of Marriage.* James filed a petition for Dissolution of Marriage in Sonoma County on November 12, 1982. In the Petition he listed both girls as children of the marriage. Sherry's Response to the Petition, signed under penalty of perjury, also declared that both girls were children of the marriage.

James exercised regular visitation with both of the children, and he supported them financially, until October, 1983. Although the family was destablized by the separation, James and Sherry nonetheless treated both children equally. Thus, the children had two parents: a father (James) who paid money for their care, and a mother (Sherry) with whom they lived.

In October, 1983 Sherry decided to live together with John, who purchased a house for this purpose. Upon that occurrence, James unilaterally discontinued his contact with Sabrina and his monetary support for her. Sherry and James then met privately, and they agreed that James would permanently sever his relationship with Sabrina.

On November 15, 1983, after Sabrina was more than 2 years and 3 months old, Sherry and James executed a Marital Settle-

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chased. Although John had intended to marry Sherry, this never occurred and in March of 1985 Sherry moved to Arizona. John continued to assist her financially by sending her $2,750 per month until February of 1986. Sherry filed the present paternity action a few months thereafter."

The Court of Appeal's statement may possibly leave the impressison that John cohabited with Sherry and Sabrina for many years. In fact, they lived together only 3 months. Moreover, the facts which the Court of Appeal recited do not constitute proof that John is Sabrina's natural father, much less do they change the matter of legal parentage, which Evidence Code section 621 settles. All of these events took place after Sabrina was over two years old. Moreover, it would well have been possible for John to live with Sherry and care for Sabrina without being Sabrina's father.

In any event, as John will discuss, the trial court (Breiner, J.) found, following an evidentiary hearing, that John was not estopped by his conduct to assert Evidence Code section 621. Thus, no inference exists that John was responsbile for Sherry's failure to file a motion for blood tests under Evidence Code section 621.

ment Agreement which provided that James was *not* the "natural" father of Sabrina. In implicit recognition that James nonetheless remained Sabrina's legal father, the Agreement further provided that James would give his consent to a stepparent adoption of the child. The Agreement also stated that James would have no obligation to pay child support for Sabrina. The parties incorporated the Marital Settlement Agreement into an Interlocutory Judgment of Dissolution of Marriage, entered on December 2, 1983.

John and Sherry remained together in the same household for only three months, and they separated in January, 1984. Over a year later, in March, 1985, Sherry moved from California to Arizona.

C. *Paternity action.* On May 30, 1986, when Sabrina was nearly five years old, Sherry filed the instant paternity action, in which she named John as the father of Sabrina. She also filed an order to show cause, to require John to submit to paternity blood tests and to pay child support. In response, John denied that he was Sabrina's father and asserted as an affirmative defense the presumption of California Evidence Code section 621, quoted earlier in this petition.

The trial court heard Sherry's order to show cause on June 18, 1986. The trial judge (Broderick, J.) found that Evidence Code section 621 applied, and he ordered a separate evidentiary hearing on whether or not John was estopped by his conduct to assert the statute.[2]

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[2] Among other rulings, Judge Broderick made the following finding: "Clearly, Evidence Code section 621 applies here and Sabrina is conclusively presumed to be the child of Plaintiff's earlier marriage, two years having elapsed since the child's birth. This is true even though the presumed father has successfully rebutted the presumption by blood test evidence within the two-year period permitted by the statute for that purpose.

"Plaintiff seeks to avoid the operation of the statute by a contention that Defendant is estopped by his conduct to assert that defense. Allegations supporting Plaintiff's estoppel contention are sparse; indeed, if she hadn't made the ambiguous allegation that the Defendant 'has

D. *Estoppel hearing.* The separate hearing on the issue of estoppel took place before another judge (Breiner, J.). Judge Breiner ruled that Sherry had failed to meet her burden to establish that John was estopped to raise the conclusive presumption. On his own initiative, however, the judge also ruled that Sherry maintained the right to demonstrate that application of Evidence Code section 621 might violate *Sabrina's* rights of Due Process of Law and Equal Protection.[3]

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held himself out as [Sabrina's] father', there would be no support for the proposition whatsoever. From the memoranda and supporting declaration it appeared that there is a substantial controversy surrounding the facts upon which Plaintiff bases her claim of estoppel. If the Defendant is not estopped to assert the two-year limitation, the motion for blood test should be denied, and in fact the entire proceeding should be dismissed."

The trial court's statement that James had rebutted the presumption is incorrect. Also incorrect is the Court of Appeal's statement that "[p]rior to Sabrina's second birthday, blood tests revealed that Sherry's husband, James, could not be the father" [Appendix A-1] and its statement that "John does not dispute Sherry's statement that these blood tests conclusively establish that it was impossible for James to be the father of Sabrina." [Appendix A-2, footnote 1]

From the commencement of this proceeding, John has disputed the foundation and validity of the tests. James' "blood test" was an unsigned notation on a Sonoma County Community Blood Bank form, dated April 13, 1974 (seven years before Sabrina's birth) Sabrina's "blood test" was an unsigned notation on a Kaiser Permanente Medical Record form at the time of her birth. Sherry did not submit any evidence of her own blood type. She did not offer her "tests" into evidence. She did not explain why she had failed to comply with Evidence Code section 621 by informing the court of this blood type information within two years of Sabrina's birth.

[3] In pertinent part, the Decision states: "[3.] Nothing herein is intended to deprive Plaintiff from attempting to establish that the application of Evidence Code section 621 is unreasonable, arbitrary, capricious, and a denial of due process. [*In re Lisa R.* (1975) 13 Cal.3d 636; cf. *Michelle W. v. Ronald W.* (1985), 39 Cal.3d 354). In weighing the competing interests of the state which has an interest in providing a status of legitimacy for the minor child, and the interests of the putative father, it may well be that it would be a denial of the child's due process

E. *Formal order.* The case then returned to Judge Broderick, who found, without any evidentiary hearing, that "the application of Evidence Code section 621 in the circumstances here presented, would constitute a violation of the due process and equal protection clauses of the State and Federal Constitutions." On May 7, 1987 the trial court issued a formal order denying John's motion to dismiss the case and ordering him to submit to paternity blood tests.

F. *California appellate actions.* John filed a Petition for Writ of Mandate, but the California Court of Appeal denied the Petition without opinion. The California Supreme Court, however, granted John's Petition for Review and retransferred the matter to the Court of Appeal, with directions to issue an alternative writ.

The California Court of Appeal heard John's Petition but denied it in a published opinion filed June 17, 1988. The Court of Appeal held that the application of Evidence Code section 621 would deny Sherry due process of law.

The Court of Appeal did not discuss, or base its ruling on, the equal protection clause, nor did the Court discuss whether the statute impaired the constitutional rights of the child Sabrina. This latter omission is significant, since Judge Breiner's ruling had been expressly based on an ostensible impairment of Sabrina's constitutional rights, and not those of Sherry. The opinion of the Court of Appeal is set forth in Appendix A-1-9.[4]

G. *Depublication by California Supreme Court.* On August 25, 1988 the California Supreme Court denied John's timely

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rights to allow the application of Evidence Code section 621. That remains to be litigated."

[4] Although the order at bar is an interlocutory one, it completely resolves the constitutionality of the statute for the purposes of this proceeding. Although the Supreme Court is normally without jurisdiction to review an interlocutory judgment, jurisdiction is proper where the federal claim has been finally decided, with further proceedings in the state court to come, but in which later review of the federal issue is unavailable, regardless of the outcome of the case. [*Pennsylvania v. Ritchie* (1987) 429 U.S. 469]

petition for review. The state Supreme Court also issued an order directing the Reporter of Decisions not to publish the Court of Appeal opinion in the Official Appellate Reports. [Appendix A-10]. The effect of this order is that the Court of Appeal decision is binding only in the present case. Thus, pending a decision of this Court in *Michael H.*, Evidence Code section 621 will remain unconstitutional for only one person in the state of California: John.[5]

REASONS FOR ALLOWANCE OF THE WRIT

The primary issue before this Court in *Michael H.* is whether Evidence Code section 621 violates the equal protection and due process clauses of the Constitution, insofar as the statute may permit the State to terminate an ongoing relationship between a putative father and a child. The constitutional issues have arisen in *Michael H.*, primarily because the statute does not afford the putative father an independent right to establish his parentage. In the present case, however, both Sherry and James had statutory remedies which they failed to utilize.

In *Michael H.*, neither the child Victoria, nor the putative father Michael, has challenged the constitutionality of Evidence Code section 621 in its entirety. Victoria specifically writes in her Brief for Appellant (p. 34) that the statute may still be constitu-

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[5] Although the state Supreme Court did not specify its reasons for striking the Court of Appeal opinion from the published reports, the common reason why the Supreme Court takes this action is because it disagrees with the result or reasoning of the decision. [See Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal. Law Rev. 514 (1984). The present California Supreme Court has placed reliance on decertification, as a means of resolving legal issues without deciding them, in the face of a heavy calendar backlog. Many scholars have criticized the increased use of this technique. [See, e.g., Uelman, *First Year Report: The Lucas Court*," California Lawyer, June 1988, p. 30] In the present instance, decertification has worked great unfairness. John is now the only person in the state of California as to whom Evidence Code section 621 is unconstitutional.

tional where, as here, a mother files a paternity action seeking to name a third party as her child's father.

In the present case Evidence Code section 621 would not terminate any ongoing relationship. Neither the accused father John, nor the child Sabrina, is seeking to establish familial bonds. Rather, it is the mother (not joined by her child) who wishes to avoid the express terms of Evidence Code section 621, so that she may change Sabrina's legal father from James to John. The apparent purpose of the mother's quest is financial: to seek child support from John, instead of James. This motivation is underscored by the fact that the only man with whom Sabrina has ever had a long-term paternal relationship in her life is James, not John. The Court of Appeal decision further disrupts this bond.

Section 621 afforded both the mother and her husband the right to file a motion for paternity blood tests within two years of the child's birth. Neither person filed such a timely motion. Instead, the mother waited until Sabrina was almost five years old to institute this challenge to her paternity.

This case therefore raises a significant constitutional question, parallel to that in *Michael H.*: does Evidence Code section 621 comport with substantive due process when its operation would not impair any person's fundamental rights and when the plaintiff had a statutory remedy which she failed to utilize?

John respectfully submits that the state Court of Appeal erred by striking down the statute. Here, the statute serves legitimate state interests, and it is constitutional because neither the child, nor the accused father, seeks to avoid its operation. The statute protects the best interests of Sabrina by precluding belated litigation over her parentage.

The proper standard of review in a case such as this one is whether a rational relationship exists between section 621 and a valid legislative purpose. When it enacted amendments in 1980 to establish a two year limitation period to rebut the conclusive presumption of paternity, the Legislature carefully considered, and weighed, the respective interests of all parties. The Court of Appeal opinion violates traditional standards of appellate review,

under which the Legislature's determination is entitled to great deference.

The issue is an especially important one, worthy of review in light of the questions which *Michael H.* poses.

A. *Evidence Code section 621 conclusively settles the issue of legal parentage.* Evidence Code section 621 applies here because Sherry meets the criteria of subsection 621 (a). She was cohabitating with her husband, who was not impotent or sterile, from well before Sabrina's conception until well after her birth. She did not comply with the requirements of subsection 621 (d): she did not file a motion for blood tests within two years of Sabrina's birth.

Having determined that Civil Code section 621 applied, the trial court should have dismissed this action.

B. *Application of Evidence Code section 621 in this case does not impair any fundamental personal rights.* Citing *In re Lisa R.* (1975) 13 Cal.3d 636 and *Stanley v. Illinois* (1972) 405 U.S. 645, the Court of Appeal opinion states that the proper standard for measuring due process challenges to Evidence Code section 621 is a weighing test, applied on a case- by-case basis. This test, however, does not apply.

The due process balancing test operates when state action would otherwise impair a fundamental personal right of a party. [See, e.g., *Parham v. Hughes* (1979) 441 U.S. 347] One fundamental right, which both *Lisa R.* and *Stanley* recognize, is the right of a natural father to maintain an established relationship with his child, in the face of the State's attempt to terminate that relationship. This right is a limited one, which may be invoked, if at all, only by a man who wants to be deemed a child's legal father, and who takes actions consistent with this desire. Absent such a situation, no Constitutional due process rights emanate.

This Court has employed the weighing test in connection with legislation which would irrebuttably bar a putative natural father from exercising parental rights with respect to a child born out of wedlock. The Courts have characterized as fundamental the right

of a natural father to the care and companionship of his child.[6] As the Court wrote in *Stanley*, quoting in part from Justice Frankfurter's concurring opinion in *Kovacs v. Cooper* (1949) 336 U.S. 77, 95:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from *shifting economic arrangements*." [emphasis added]

Lisa R. similarly applied a balancing test, since the issue in that case involved the right of a natural father to have a legal relationship with his child, in the face of a statute which would otherwise have acted as an absolute bar.

When a man does not seek the custody of a child, however, the same strict standard of due process simply fails to apply. Thus, for example, in *Quilloin v. Walcott* (1978) 434 U.S. 246, the Supreme Court distinguished the due process considerations enunciated in *Stanley* by writing that "this is not a case in which the unwed father had, or sought, actual or legal custody of his child."

In *Lehr v. Robertson* (1983) 463 U.S. 248, the Supreme Court again made this distinction in another case involving a claim by a natural father. The Court initially explained its ruling against the father by writing that legislative enactments in the family law area are entitled to great deference:

> In the vast majority of cases, state law determines the final outcome. [citation omitted] Rules governing the inheritance of property, adoption and child custody are generally specified in statutory enactments that vary from State to State. Moreover, equally varied state laws governing marriage and divorce affect a multitude of parent-child relationships. The

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[6] In *Lassiter v. Department of Social Servs.* (1981) 452 U.S. 18, 27, the Court wrote that "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' "

> institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.

Although putative fathers may on occasion have constitutional due process rights, irrespective of the proscription of state statutes, this Court in *Lehr* wrote that such rights arise only when the putative father has developed a relationship with the child[7]:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

The Court of Appeal erred by applying in reverse the limited constitutional right of a putative father to the companionship of that father's child. As the opinions of the United States Supreme Court instruct, such a right arises only if a natural father seeks the parental relationship and takes demonstrable actions to develop it.[8] In the instant case, John has denied that he is the child's

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[7] Here, by contrast, John lived with Sherry and Sabrina for three months. Such a short time period does not remotely constitute a "developed relationship."

[8] In *Louden v. Olpin* (1981) 118 Cal. App. 3d 365, the California Court of Appeal considered, and rejected, a claim that the constitutional right recognized in *Stanley* can be applied *against* a natural father who wished no contact with a child. The Court of Appeal wrote: "Appellant urges us to create a reciprocal right in children to order visitation and relies on *Stanley v. Illinois* [citation omitted] for that proposition. *Stanley* recognized the constitutional right in the unwed father to his

biological father; has not asked to be designated as the child's legal father; and has not sought to establish any parental relationship.

Unfortunately, the Court of Appeal opinion would consecrate James' decision, with Sherry's concurrence, to sever his legal ties with Sabrina and to abrogate his support responsibilities. At the same time, the opinion would open the settled matter of Sabrina's parentage, and it would deprive Sabrina of the only man with whom she has ever enjoyed an ongoing legal relationship: James.

Sherry has no protected constitutional standing under the due process clause, sufficient to invalidate application of the specific provisions of Evidence Code section 621, because her parental status with the child is not in question. Sabrina has not filed any action to establish a parental relationship with John.

Accordingly, a due process weighing test is inapplicable in this case, because Evidence Code section 621 does not defeat a fundamental personal right of any party. The correct test is whether Evidence Code section 621, in its present form, withstands a rational relationship analysis.

B. *The rational relationship test applies here.* The normal test for measuring any due process challenge to social legislation, applicable in the present instance, is whether the legislation is "demonstrably arbitrary or irrational." [*Duke Power Co. v. Carolina Environmental Study Group, Inc.* (1978) 438 U.S. 59]. Under this approach, the legislation is presumed valid and must be upheld as long as it bears some rational relationship to a legitimate state function. [See, e.g., *Williamson v. Lee Optic Co.* (1955) 348 U.S. 483; *Ferguson v. Skrupa* (1963) 372 U.S. 726]

In his famous dissent in *Lochner v. New York* (1905) 195 U.S. 45, which this Court has since adopted as the better rule of substantive due process analysis, Justice Holmes wrote the following passage with respect to the rational relationship approach to a court's review of social legislation:

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natural child. The court did not decide whether the right is reciprocal in the child and such a conclusion does not naturally flow."

> [The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

The Supreme Court has since invoked the rational relationship test on countless occasions to uphold various legislative enactments. [See, e.g., *Hawaii Housing Authority v. Midkiff* (1984) 467 U.S. 229; *West Coast Hotel v. Parrish* (1937) 300 U.S. 379] As Justice Stone wrote in *United States v. Carolene Products Co.* (1938) 304 U.S. 144, "where the legislative judgment is drawn in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed, affords support for [the legislation]."

Prior to the 1980 amendments, Evidence Code section 621 operated as a conclusive presumption of paternity. The 1980 amendments have removed the irrebuttable nature of this presumption, provided that the parties meet the statutory requirement of filing a timely motion for blood tests. [See *Michelle W. v. Ronald W.* (1985) 39 Cal.3d 995, appeal dismissed, 106 S.Ct. 774]. Nevertheless, in *Mourning v. Family Publications Services, Inc.* (1973) 411 U.S. 356, the Supreme Court even applied the rational relationship test to an irrebuttable legislative presumption which did not involve a fundamental personal right[9]:

> It is not a function of the courts to speculate as to whether the statute is wise or unwise or whether the evils sought to be remedied could have been regulated in some other manner.

The Supreme Court took the same approach in *Weinberger v. Salfi* (1975) 422 U.S. 749. Indeed, as one commentator has written, the more stringent due process balancing test is particularly unsuited to the review of conclusive legislative presumptions which do not involve fundamental rights [Note, *Constitutional*

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[9] The issue was the constitutionality of the Four Installment Rule of Regulation "Z," under the Federal Truth in Lending Act.

Law: The Irrebuttable Presumption, 14 Washburn Law J. 141, 145 (1975)]:

> Allowing an individualized determination for every individual affected by legislatively created conclusive presumptions, seems an administrative impossibility.

The conclusive presumption of paternity has been in existence since ancient times. At common law it was known as Lord Manfield's Rule. It was part of the Napoleonic Code. Prior to the amendments which the Legislature enacted in 1980, Evidence Code section 621 had three recognized purposes: "(1) preservation of the integrity of the family; (2) protection of the innocent child from the social stigma of illegitimacy; and (3) a desire to have an individual rather than the state assume the financial burden of supporting the child." [*In re Marriage of B.* (1981) 124 Cal. App. 3d 524]

The California Supreme Court upheld the former version of the law based on the relational relationship standard. [*Kusior v. Silver* (1960) 54 Cal.3d 603] In *Kusior*, as in the present case, a child's mother sought to deem a third party the legal father of her child, but the state Supreme Court held that the conclusive presumption barred her suit.

In 1980, following a suggestion in a law review article that a statute of limitations might be the more appropriate approach to the conclusive presumption in light of improvements in paternity blood testing, the Legislature amended Evidence Code section 621. [Recent Developments, *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy* (1968) 20 Stan. L. Rev. 754; see *Estate of Cornelious* (1984) 35 Cal.3d 461, 465-466, appeal dismissed 467 U.S. 967; *In re Marriage of B.*, *supra*, 124 Cal. App. 3d 524] According to these court opinions, the primary purpose of the amendments was to give a husband or wife limited rights, under specified conditions, to rebut the conclusive presumption by presenting blood test evidence to the court within two years of the child's birth.

The Legislature manifested its express intent to place a two year limit on the time for challenging the conclusive presumption.

Thus, the Report to the state Senate Committee on Judiciary states:

> This bill would require that a challenge to the conclusive presumption of the husband's paternity of the child must be *brought* within two years after the birth of the child, after which the conclusive presumption would be applied *without exception.* (emphasis added)

Under the pertinent rational relationship test, Evidence Code section 621 is constitutional because it continues to serve valid state purposes of settling a child's parentage after two years, and of fixing the obligation to pay child support. In the present case, unlike the situation in *Michael H.*, the validity of these legitimate objectives is unaffected by any desire of the child or accused father to establish familial bonds. Sherry's untimely suit against John is barred by the limitations period set forth in the statute, and the suit should therefore be dismissed.

C. *Even if a weighing test applied, the statute would still be constitutional in this case.* For the reasons John has discussed above, the Court of Appeal should not have employed a due process balancing test, since Evidence Code section 621 does not defeat any recognized fundamental personal rights of any party. The proper approach is the rational relationship test. Nevertheless, even if a weighing test were applicable, the Court of Appeal incorrectly analyzed the essential components based upon established precedent.

1. *Interests of the State.* The interests of the state in upholding section 621 are served in three respects.

First, application of the statute serves the important interest of protecting the established status of children born of lawful marriages, after two years have passed from the date of a child's birth. James maintained continuing personal and financial contact with Sabrina until she was two years and three months old. Then, he unilaterally severed his relationship with his daughter. The state has an interest in protecting a child from such behavior.

Second, the presumption of paternity serves the state's interest in fixing the obligation of adults to support their children. Sabrina

was born when Sherry and James were married and cohabiting. Sherry listed her as their child on her birth certificate. Sherry and James acknowledged that Sabrina was their child when they filed their initial pleadings in their dissolution of marriage action. James supported Sabrina financially. Only after Sabrina was more than two years old did Sherry and James mutually take a contrary position in the stipulated divorce judgment, apparently so that James could attempt to avoid paying child support. Public policy is served by preventing belated action by parents to defeat a father's duty to support his child.[10]

Finally, the state has a valid general concern about protecting its legislative process, and the constitutionality of duly-enacted laws.

2. *Interests of Sabrina.* Children have an interest in protecting and maintaining settled relationships. Sabrina also has an interest in not having a court change her legal father, especially now that she is over seven years old. In all respects, Sabrina has an interest in the prompt termination of this challenge to her status.

---

[10] Under California law parties cannot agree to the non-paternity of a child or the waiver of child support. Such agreements are considered to be contrary to fundamental public policy and therefore void *ab initio*. [*In re Marriage of Ayo* (1987) 190 Cal. App. 3d 442; *In re Marriage of Goodarzirad* (1986) 185 Cal. App. 3d 524] Thus, Sherry and James' Marital Settlement Agreement is void, to the extent that the parties purported to agree that James was not Sabrina's father and that he did not have to pay child support.

Even if the provision in the Marital Settlement Agreement stating that James is not Sabrina's natural father were valid (and it is not valid, but rather void, as discussed above) the Agreement by its very terms does not purport to change the fact that James remains Sabrina's *legal* father. Instead, the Agreement implicitly recognizes this legal relationship by stating that James would agree, upon request, to consent to Sabrina's adoption by a third party. Only a legal or presumed father can give such consent.

Sabrina has not joined with Sherry in this lawsuit, nor has she requested at any time to change her legal father from James to John.[11]

3. *Sherry*. Since Sherry's legal relationship with Sabrina is not in question, her only interest is financial. She would prefer to seek child support from John instead of her former husband James.[12] The California Supreme Court, however, has expressly

---

[11] Even if Sabrina had made such a request, however, she would have no recognized constitutional right to impose a legal relationship on a man whom she believes might be her biological father. The only recognized constitutional rights, which under some circumstances may be sufficient to override a statute, are those of the natural father to custody and control of the child. [Comment, *Rebutting the Marital Presumption: A Developed Relationship Test* (1988) 88 Columbia L. Rev. 369, 377-378].

California, like most states, has a closed record policy for adoption files [Civil Code section 227 (a); See generally, Note, *Artificial Insemination: Disclosure Issues* (1979) 11 Columbia Hum. Rts. L. Rev. 87] Upon the written request of any party in an adoption, and court order, a minor adopted child may be precluded from inspecting court files to obtain the identity of his or her natural parents. If a child had a constitutionally-protected interest in knowing the identity of the biological father, this statute would be unlawful. Yet, for years the courts have upheld it as being strongly consistent with public policy. [See, e.g., *Hubbard v. Superior Court* (1961) 189 Cal. App. 2d 741]

[12] The California courts have held that legal, rather than biological paternity, is the pertinent measure of a father's rights and responsibilities. Biological parentage is irrelevant. [*Keaton v. Keaton* (1970) 7 Cal. App. 3d 214; *Vincent B. v. Joan R.* (1981) 128 Cal. App. 3d 619; *Ferguson v Ferguson* (1981) 126 Cal. App. 3d 744]. Although Sherry may wish to ascertain whether John, or some other third party, is Sabrina's biological father, such an objective is not constitutionally mandated or protected. This objective may be important to Sherry for economic and personal reasons, but it is not a basis for her to proceed in a court of law in the face of a statutory proscription.

Furthermore, any argument that a mother (or the State, as the case may be) could have a right to seek support from the biological, rather than the legal father, raises serious countervailing constitutional concerns of its own. As one commentator writes [Comment, *Rebutting the*

and correctly ruled that a purely financial interest is not constitutionally protected. [*Estate of Cornelious, supra,* 35 Cal.3d 461, appeal dismissed, 467 U.S. 967][13]

D. *The trial court's order violates the right of privacy.* Because Evidence Code section 621 bars this proceeding, any blood test evidence would be irrelevant. As such, an order compelling John to submit to tests is an unconstitutional invasion of privacy and an unreasonable search and seizure.

Marital Presumption: A Developed Relationship Test (1988) 88 Columbia L. Rev. 369, 378]: "[T]here will be cases in which the husband and wife are able to support the child, while the putative father cannot, so that allowing the putative father to establish his paternity and support the child would not serve the state interest. Thus, passing an inclusive statute would be hopelessly overinclusive. Further, if the state's goal were to preserve the public fisc, the use of inclusive statutes to achieve that goal would constitute "clumsy and deliberate legislative discrimination between the rich and the poor," and could not withstand scrutiny under the equal protection clause. [quoting Justice Rehnquist's dissent in *Zablocki v. Redhail* (1978) 434 U.S. 374]

[13] The trial court alternately based its ruling on the Equal Protection Clause. The Court of Appeal did not address the argument of equal protection but instead relied exclusively on due process. Sherry has not specified how Evidence Code section 621 would deny her equal protection. John respectfully submits that no equal protection issue exists.

CONCLUSION

The present case raises important issues, which are parallel to those in *Michael H.* Here, Evidence Code section 621 meets the governing rational relationship test, because the statute does not impair the fundamental personal rights of any party. Rather, enforcement of the statute is in the best interests of the child Sabrina, who has not joined in this challenge to her own parentage.

John respectfully submits that the Legislature is entitled to deference with respect to the scope of the 1980 amendments which it chose to enact. Sherry's suit violates the express terms of the statute.

The Court should grant the Petition for Certiorari.

DATED: October 31, 1988

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By BERNARD N. WOLF
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In the Court of Appeal of the State of California

First Appellate District

Division Four

A039036

(Super. Ct. No. 128238 Marin County)

John Roe, Petitioner,

v.

Superior Court of the State of California,
County of Marin, Respondent;

Sherry Doe, Real Party in Interest.

Petitioner (John) challenges an order denying his motion to dismiss a paternity action against him and ordering him to submit to a blood test to determine paternity. We hold that the order is correct and deny the petition.

PROCEDURAL HISTORY

On April 30, 1986, Sherry Doe, real party in interest herein, filed an action under the Uniform Parentage Act (Civil Code § 7000 et seq.) alleging that John is the natural father of her daughter Sabrina and asking for support. She asked that John be ordered to take a blood test and submit the results to the court. In a declaration supporting the action, Sherry stated that Sabrina was born while she was married to a man other than John. Prior to Sabrina's second birthday, blood tests revealed that Sherry's husband, James, could not be the father. The couple was divorced and the judgment of dissolution recited that James was not the father of Sabrina. The declaration then stated that John had initially supported real party and Sabrina and had held himself out as Sabrina's father.

John opposed the action contending that it was barred by the conclusive presumption of section 621 of the Evidence Code. Respondent court ordered a hearing on the question of whether John was estopped by his conduct to assert the defense of section 621; it ruled that while he was not estopped to raise the defense,

Sherry could nevertheless litigate the question of whether application of section 621 "is unreasonable, arbitrary, capricious and a denial of due process."

Sherry raised the issue of the application of section 621 by a motion to require John to submit to blood testing. He opposed the motion and moved to dismiss. The court ruled in favor of Sherry, thus precipitating the instant petition.

FACTS

In 1974, Sherry married James. They had a daughter, Alexis, whose parentage is not in question. In 1980, Sherry and John, who had been casual acquaintances for ten years, commenced a sexual affair. (John was married at the time and had a family of three children.) When Sherry discovered she was pregnant she told John but when he asked if he was the father, according to her testimony she told him that she really didn't know.

Sabrina was born on July 30, 1981. Sherry and James separated nine months later because of Sherry's continued involvement with John. James filed for dissolution and the resulting interlocutory judgment of dissolution incorporates a Marital Settlement Agreement in which the parties agree that James is not the natural father of Sabrina. Sherry testified that this agreement was made because James had developed information that led him to believe that he was not Sabrina's father. A 1974 blood test of James determined that his blood type was AB whereas a blood test of Sabrina dated August 5, 1981, determined her blood type to be O.[1] The agreement was reached in a meeting between Sherry and James and their attorneys in August of 1983. The judgment of dissolution did not provide for child support for Sabrina as it did for Alexis.

John and Sherry lived together with her daughters at various times after James and Sherry separated. In October of 1983, John and Sherry commenced living together in a house that they

---

[1] John does not dispute Sherry's statement that these blood tests conclusively establish that it was impossible for James to be the father of Sabrina.

selected together and John purchased. Although John had intended to marry Sherry, this never occurred and in March of 1985 Sherry moved to Arizona. John continued to assist her financially by sending her $2,750 per month until February of 1986. Sherry filed the present paternity action a few months thereafter.

DISCUSSION

John now seeks to avoid submitting to blood tests and to defeat Sherry's paternity action against him by asserting the bar of the Evidence Code's conclusive presumption that Sabrina as the issue of Sherry who was cohabitating with her husband, James, is a child of that marriage.

Evidence Code section 621 provides in relevant part:

> "(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.
>
> "(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.
>
> "(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.
>
> "(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child."

Sherry cannot utilize subdivision (d) to avoid the conclusive presumption of section 621 since her petition to establish John's parentage was obviously not filed within two years of Sabrina's birth and did not include John's affidavit acknowledging paternity.

However, respondent court found that James had rebutted the presumption and reasoned that once the presumed father had established his nonpaternity, the conclusive presumption no longer existed and could not be relied upon by an alleged father. The court also concluded, and we agree, that application of the conclusive presumption to this case would deny Sherry due process. It is thus unnecessary for this court to determine the effect of the judgment of dissolution on the conclusive presumption of paternity.

In *In re Lisa R.* (1975) 13 Cal.3d 636, our Supreme Court, applying *Stanley v. Illinois* (1972) 405 U.S. 645, adopted a balancing test for review of due process challenges to a conclusive presumption of paternity. That test requires a case-by-case weighing of the state's interest in maintaining the presumption against the competing private interests in rebutting it. (*In re Lisa R., supra*, 13 Cal.3d at pp. 648, 651, fn. 17.) In the *Lisa R.* case, Lisa, a two-year-old child, had been adjudged a dependent ward of the court. Her mother was an alcoholic; her mother's husband was a drug addict. (*Id.*, at p. 640.) Lisa lived with various foster parents. At a status review when Lisa was five and both her mother and the presumed father were dead, a man claiming to be Lisa's biological father sought to prove that fact. The trial court refused him permission due to the conclusive presumption that Lisa was the legitimate issue of the marriage of her mother and the presumed father. In focusing first on the rights of the putative father, the court noted the type of relationship which the man had had with Lisa's mother, the fact that he had asserted his rights when he first discovered Lisa was a dependent ward of the court and the fact that he had no alternative remedy by which to protect his interests. The court then enumerated the state's potential interests—accomplishing the purposes of the Juvenile Court Law, relieving a child of the stigma of illegitimacy, promoting marriage, speed and efficiency of judicial inquiry—and found that none of them outweighed the father's interests.

Our attention is called to two cases subsequent to *In re Lisa R.*, in which the balancing test has resulted in application of the conclusive presumption. In *Estate of Cornelious* (1984) 35 Cal.3d 461, an adult claimed to be a decedent's illegitimate

daughter and petitioned the trial court for appointment as administratrix of his estate. The trial court applied the conclusive presumption and the Supreme Court affirmed. The court held that the woman's interest in proving that decedent was her biological father did not outweigh the state's interest in preventing her from rebutting the presumption. The woman's interest was solely her hope of gaining a right to inherit since there was no possibility of an ongoing relationship with the biological father. On the other hand, the court viewed the state's interest as substantial since the policies promoted by the conclusive presumption of legitimacy were served by the application of the presumption. The woman had been reared and supported by her presumed father who died thinking he was her natural father. "Her equities are simply not in the same class as those of the fathers in *Stanley* and *Lisa R.*" (*Estate of Cornelious, supra*, 35 Cal.3d at p. 467.)

In *Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354, a child and her stepfather, Donald, brought an action seeking to prove that he was the child's biological father. Michelle was born during her mother Judith's marriage to Ronald. The marriage was dissolved when Michelle was five years old. The issue of paternity was not raised and Ronald agreed to pay child support, and he regularly exercised visitation rights. However, when Michelle was six, Judith married Donald and refused to allow Ronald to continue visiting Michelle. About a year later, Donald and Michelle brought an action to establish Donald's paternity. The trial court applied section 621 and held that Ronald was conclusively presumed to be Michelle's father. The Supreme Court balanced the interests of Michelle and Donald against the state interests and concluded that the presumption should be applied. First, the court noted that unlike the challengers in both *Stanley* and *Lisa R.*, the putative father was not attempting to establish a legal relationship with a child who otherwise had no parents. The court then ruled that Donald's interest was overruled by the social policies upholding the integrity of the family and protecting the child's welfare. (*Michelle W. v. Ronald W., supra*, 39 Cal.3d at p. 362.) The

court viewed the child's interest under the circumstances of the case before it as no greater than those of the putative father.[2]

The interest of real party in the case at hand is to establish the parentage of her child and to secure support from the biological father. To that extent she represents the interests of Sabrina. (See *Perez v. Singh* (1971) 21 Cal. App. 3d 870, 872.) She could not realistically have moved to protect these interests by an action during the period or by the means provided to her by section 621. Obviously, she could not have obtained an affidavit from the putative father, John, who is contesting his parentage. She cooperated with her husband, James, to establish the biological parentage of Sabrina by recognizing in the Marital Settlement Agreement that James was not Sabrina's biological father. The interest of Sherry and Sabrina in determining parentage and obtaining support is substantial; contrasted therewith is the interest of John which unlike that of the putative fathers in the cases discussed above, is one of avoiding paternal responsibilities.

Nevertheless, it is the interest of the state that is to be balanced against the interers of those who challenge the conclusive presumption. The most significant interest of the state in upholding the conclusive presumption is the integrity of the family. This interest has been recognized even in the face of the death of the presumed father where that presumed father had a long-standing and firmly established relationship as in *Estate of Cornelious, supra*, 35 Cal.3d 461. That interest is much weaker in this case

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[2] The most recent case cited is also a case in which a putative father sought to establish his paternity. (*Michael H. v. Gerald D.* (1987) 191 Cal.App.3d 995.) The child cross-complained to establish a legal or defacto/psychological parent-child relationship with either the presumed or the putative father. The child had lived with both the presumed and the putative fathers but at the time of the appeal, the mother, presumed father and child were living together as a family. (*Id.*, at p. 1002.) The court held that the interest of the putative father was outweighed by the interest of the state in upholding the integrity of the family. The court also concluded that, given the facts of the case, the welfare of the child would be harmed, not protected, if she were permitted to rebut the conclusive presumption of legitimacy. The United States Supreme Court granted review on February 29, 1988.

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than in *Cornelious* or *Michelle W.* The relationship of James and Sabrina was shortlived since, before Sabrina was two years old, James had filed for dissolution and during that proceeding had taken steps to refute the conclusive presumption of paternity. Unlike the case of *Michelle W.*, there is no presumed father ready to assume parental responsibilities.

The other significant state interest is protection of the child's welfare. (*Michelle W. v. Ronald W., supra*, 39 Cal.3d at p. 362) In *Michelle W.*, the court rejected the argument that the "stigma" of illegitimacy should be considered in view of the "Uniform Parentage Act" (Civ. Code, § 7000 et seq.) which abolished the concept of illegitimacy. (39 Cal.3d at p. 362, fn. 5) The welfare of Sabrina could only be served by determining her biological father and obtaining support. Without such a determination, she would either be left with no father or with further litigation to collaterally attack the determination of nonpaternity in the judgment dissolving the marriage of her mother and James.

We hold that the interests of Sherry and Sabrina in establishing biological parentage outweigh the interests of the state in enforcing the conclusive presumption. It thus would be a denial of due process to preclude this action on the ground of the conclusive presumption.

The alternative writ is discharged and the petition is denied.

CERTIFIED FOR PUBLICATION

_____

Anderson, P.J.

We concur:

_____

Poche, J.

_____

Channell, J.

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Trial Judge:	Henry Broderick
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Order Denying Review

After Judgment by the Court of Appeal

1st District, Division 4, No. A039036
S002717

In the Supreme Court of the State of California

In Bank

John Roe, Petitioner,

v.

Superior Court of the County of Marin, Respondent;
Sherry Doe, Real Party in Interest.

Petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed June 17, 1988. (Cal. Const., Art. VI, section 14; Rule 976, Cal. Rules of Court.)

LUCAS,
Chief Justice

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-709

In The

Supreme Court of the United States

October Term, 1988

JOHN ROE,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

SHERRY DOE,

Real Party in Interest.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION 4

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SUMMARY OF REASONS FOR DENYING PETITION

Petitioner's primary reason for requesting certiorari is that this case involves the constitutionality of California Evidence Code section 621, which is pending in *Michael H. and Victoria D. v. Gerald D.*, No. 87-746. (Petition p. 3.) Although they involve the same statute, the two cases raise fundamentally different legal issues because of the significant difference in the facts and procedural contexts of each. Moreover, *Michael H.* was a published decision, which therefore set a precedent. The present opinion is not published, and therefore has no precedential weight.

In *Michael H.*, Michael and Victoria sought to establish that Michael was Victoria's biological father even though Victoria's mother, and her husband Gerald, were still living together with Victoria as a family. Gerald objected to this disruption. It was primarily because of California's strong public interest in upholding the integrity of an intact family that the Court of Appeal held that Evidence Code section 621 could constitutionally bar the action.

The present case is extremely different. Sherry and her husband, James, had dissolved their marriage before Sherry filed the present paternity action. That dissolution judgment determined that Sherry's daughter, Sabrina, was not James' child. This was because the parties had learned that James' blood type was AB, and that Sabrina's was O. Therefore, James could not be Sabrina's father. Petitioner, John, nevertheless seeks to use Evidence Code section 621 as a shield against allowing a determination that he is Sabrina's father.

If this court were to reverse *Michael H.*, and to hold that the statute is unconstitutional on those facts, then

there would be even more reason to uphold the Court of Appeal's decision in the present case, since it held that the statute was unconstitutional as applied here. Even if this court were to affirm *Michael H.*, that would not compel a different result here because allowing the present action to proceed does not threaten to disrupt an intact family. John's assertion that the Court of Appeal opinion "further disrupts" a bond between Sabrina and James is patently false. The only reasonable conclusion is that certiorari in the present case, or further consideration in light of what this court decides in *Michael H.*, is unnecessary.

Denial of the petition now is also important for another reason. Under California law, Sherry cannot obtain child support from John until there is a determination of his paternity. *Thomas B. v. Superior Court*, 175 Cal.App.3d 255, 258; 220 Cal.Rptr. 577 (1985). Sherry filed this action in April of 1986. As a result of John's appellate challenges, paternity has yet to be decided. All during this time Sabrina has been denied support from John. Since James is not Sabrina's father, the court-ordered judgment in his divorce from Sherry does not require him to support Sabrina. Sabrina should not have to wait any longer to receive support from John, if he is in fact her father.

Petitioner's second reason for requesting certiorari is the assertion that the trial court, and the Court of Appeal, relied on an incorrect test in analyzing the constitutional issue. Petitioner asserts that the rational relationship test should be used, instead of the balancing test adopted by the California Supreme Court in *In re Lisa R.*, 13 Cal.3d 636; 119 Cal.Rptr. 475; 532 P.2d 123 (1975), which had followed this court's decision in *Stanley v. Illinois*, 405

U.S. 645 (1972). Petitioner did not raise this argument until after he had lost in the Court of Appeal. This alone is a sufficient reason to deny certiorari.

Moreover, petitioner is incorrect on the merits. The rational relationship test is used to assess the constitutionality of economic legislation. Fundamental personal rights are at stake where parentage is involved. Indeed, petitioner concedes that it is correct to use the balancing test when a father seeks to establish his parentage. The right of a mother or child to establish who is the child's father is as much a fundamental right as is that of a father to determine whether a child is his.

Certiorari should also be denied because the petition greviously misstates the facts. From reading the petition, one would think that Sherry had almost randomly selected John as Sabrina's alleged biological father, that she unreasonably waited until Sabrina was over 4 years old to bring an action to establish John's parentage, and that Sabrina had no relationship with John. In fact, John and Sherry had a serious, long-standing relationship. During it, John promised to marry Sherry and he became very close to Sabrina. Sabrina called John "daddy", and she was enrolled in pre-school under John's last name. Sherry did not bring this action sooner precisely because that relationship led her to believe that a paternity action against John was unnecessary. It was not until John changed his mind about marrying Sherry, and stopped supporting her and Sabrina financially, that Sherry had any reason to file this action. It would have been unreasonable to require Sherry to have sued John sooner than she did.

In a petition for certiorari, the petitioner is not required to support his factual statements with references

to the trial court record, and that record unfortunately is not before this court. Therefore, in this answer Sherry will set forth more of the underlying facts, to assist this court in understanding why the result reached by the Court of Appeal is correct.

Finally, in her briefs in the California courts, Sherry explained that the trial court's decision was correct for several additional reasons. The Court of Appeal did not have to reach these issues because of the manner in which it disposed of the case in Sherry's favor by holding that the statutory presumption of section 621 could not be applied to shield John.

First, the presumption that Sherry's husband James was Sabrina's father had been properly rebutted by the judgment entered in their divorce. It adjudicated that Sabrina was not James' child. Therefore, John cannot defend against this action by asserting that James must be Sabrina's father by virtue of a statutory presumption. Thus, it would be an idle act for this court to grant certiorari. Even if it reached a different conclusion from that of the Court of Appeal on the constitutional issue tendered by John, the result would not change.

Second, Evidence Code section 621 is unconstitutional here for a reason which the Court of Appeal also did not reach. It discriminates between men and women without any rational basis. A woman can only rebut the presumption if she submits an affidavit from the biological father which admits his paternity. The husband does not need to do this.

Third, the two year statute of limitations for rebutting the presumption is too short to pass constitutional muster under this court's recent decision in *Clark v. Jeter*, ___U.S. ___; 108 S.Ct. 1910; 100 L.Ed.2d 465 (1988), which

invalidated Pennsylvania's six year statute of limitations for paternity cases.

STATEMENT OF FACTS[1]

In 1974, Sherry married James Conrad. (Ex. 18.) They had a daughter, Alexis, who is not involved in the present proceeding. *Ibid.* Sabrina was born on July 30, 1981. *Ibid.* James filed for dissolution of marriage on November 14, 1982. (Ex. 17, 58.) His petition listed Sabrina as a child of the marriage. (Ex. 58.) Sherry's response listed Sabrina as a child of the marriage because she thought that this meant Sabrina was born during the marriage, which she was. (Ex. 60, RT 97:21-26.)

Sabrina, in fact, is not James' child. (Ex. 13:7-10.) Blood tests performed before Sabrina's second birthday established that it was impossible for James to be her father. When James had given blood in 1974, the Sonoma County Community Blood Bank determined that his blood type was AB. (Ex. 15.) Medical records of the Kaiser Permanente Medical Center in San Rafael dated August 5, 1981, show that both Sherry and Sabrina have type O blood.[2] (Ex. 16.)

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[1] The record citations in parentheses are to the page numbers of the exhibits John filed in support of his petition for a writ of mandate in the Court of Appeal, (Ex——) and to the Reporter's Transcript (RT——). Not all these facts were included in the Court of Appeal's opinion.

[2] John claims that Sherry did not offer the blood tests into evidence, and that they lacked a proper foundation. (Petition 6, ¶¶ 2-3 of fn.) These claims are specious. Sherry attached the

(Continued on following page)

These facts came to James' attention during the summer of 1983. (RT 115:23-116:6.) Since the blood types precluded James from being Sabrina's father, Sherry and James reached an agreement on this subject in August of 1983. (RT 116:3-6.) They incorporated this into a Marital Settlement Agreement in their pending dissolution, rather than litigating the issue. (Ex. 13:6-15, 18:¶¶f.) This agreement recited that James was not Sabrina's natural father. (Ex. 13:10-11, 18:12-13.) James and Sherry therefore agreed to joint custody over Alexis, while both legal and physical custody of Sabrina was given to Snerry alone. (Ex. 19:¶2.) Provisions were made for James to visit with, and to pay child support for, Alexis; no such provisions were made with respect to Sabrina. (Ex. 19:¶¶2-3.) This agreement was incorporated into a judgment of dissolution of marriage on December 23, 1983. (Ex. 17.)

On April 30, 1986, Sherry commenced the present paternity action by filing a complaint against John under the Uniform Parentage Act, California Civil Code sections 7000 et seq. (Ex. 2.) What follows are the reasons

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(Continued from previous page)

documents to a declaration in support of her original order to show cause. (Ex. 10-16.) She also attached them to her motion to compel John to take blood tests. (Ex. 257-271.) Under California law, a motion can be decided based on declarations alone. *Reifler v. Superior Court*, 39 Cal.App.3d 479, 483; 114 Cal.Rptr. 356 (1974).

John did not object to the manner in which the blood test evidence was presented until after the trial court had ordered him to have a blood test, when he made a motion for reconsideration. (Ex. 378:23-379:2.) Before then, John's only objection was that the blood tests were irrelevant because James was conclusively presumed to be Sabrina's father under California Evidence Code section 621. (Ex. 42-50, 282-291.) John therefore waived any other potential evidentiary error in admitting them. Cal. Evid. Code, § 353.

that Sherry brought this action against John, and the reasons that she did not bring it earlier.

Sherry and John met in 1970. (RT 59:3-7.) In 1980, they became intimate and began to see each other on a regular basis. (RT 59:8-20.) Sherry told John when she learned that she was pregnant. (RT 59:23-25.) She was not sure who the father was because she was still married to James. (RT 60:4-7, 61:18-26.) After Sabrina's birth, Sherry and John continued to see each other regularly. (RT 63:8-14.) John also gave Sherry substantial financial assistance. (RT 108:4-24, 109:12-110:10.) When Sabrina was nine months old in 1982, Sherry and James separated because of her involvement with John. (RT 63:24-28.)

As Sabrina developed, she resembled John physically. (RT 64:1.) Sherry started to believe more strongly that John could be Sabrina's father. (RT 64:24-65:1, 69:21-70:4, 70:25-71:6.) Sherry told John that she wanted to tell James about her suspicions, because she felt guilty concealing them. (RT 81:2-4, 97:1-3.) John did not want Sherry to tell James, because it would result in bad publicity for John. (RT 97:4-5.) James could use this information against John, who was already having problems with the press. (RT 97:5-9.)

John pleaded with Sherry not to say anything. (RT 81:6.) He told her that everything would work out. (RT 81:7-10, 97:9-10.) They would get married, he would take care of them, and they would have a wonderful life together. (RT 81:7-10, 97:9-10.) Sherry therefore did not tell James. (RT 81:11-15.)

John acknowledged that he intended to marry Sherry. (RT 129:22.) For example, in August 1982 he wrote a twelve page letter describing a scenario for their wedding. (Plaintiff's Exhibit No. 9, RT 89:28-90:20.) John sent

Sherry many letters declaring his undying love. (RT 87:21-90:23, Plaintiff's Exs. Nos. 6-9.) One such letter was for Sherry's birthday on June 4, 1983 which was before Sabrina turned two. (RT 89:4-9.) In July 1983, John gave Sherry an $11,000 engagement ring. (RT 138:18-28.) In October of 1983, John and Sherry started living together in Mill Valley, in a house that they selected together and John purchased. (RT 119:22-28, 132:21-133:2.)

According to Sherry, John did not divorce his wife because he was hoping that she would get fed up with the situation and divorce him. (RT 105:28-106:6.) John did not want to hurt his wife because they had been married for a long time. (RT 106:7-8.) He was also trying to avoid hurting his children. (*Ibid.*) John told Sherry that it would take some time, but that eventually it would happen. (RT 106:9-10.) Sherry believed him. (RT 109:10.) John also told Sherry that in his heart, he knew Sabrina was his child. (RT 106:16-19.) Although John contradicted some of Sherry's testimony, he never denied this.

Sherry also testified that she and John had the following discussion about their plans: John told Sherry that he would divorce his wife, but that this might take some time because he cared for his wife and did not want to hurt her. (RT 80:15-18.) He told Sherry that he loved her, that they would get married, and that he would adopt Sabrina. (RT 80:18-19.) Sherry realized that it would be bad for John's reputation if the fact that he was Sabrina's biological father became known. (RT 97:14-15.) She believed John would adopt Sabrina when they married. (RT 80:19, 106:13-15.) If they did it that way, no one would ever question anything. (RT 97:13-17.) John denied that they had this conversation, and that he ever promised to adopt Sabrina. (RT 128:3-5.)

The trial court found that John did promise to adopt Sabrina, but that this did not occur until after she turned two years old. (Ex. 252:19-21.)

John acted like a "proud father" towards Sabrina. (RT 21:10-12, 24:7-9.) Sabrina acted like John's daughter by calling him "Daddy." (RT 28:4-18, 30:16-23.) Sabrina was enrolled in preschool in 1983 under the name of Sabrina McKean. (RT 65:24-66:5, 69:1-4.) McKean is John's last name. (Ex. 2.)

In March of 1985, Sherry moved to Arizona. (RT 109:1-5.) John continued to assist her financially, by sending $2,750 per month. (RT 109:6-19.) In January of 1986, John's wife found out that John and Sherry were together and was quite upset. (RT 110:11-21.) John told his wife that he was sorry, but he was leaving her. (RT 110:21-25.) John, however, did not leave his wife. (RT 110:28.) Instead, he stopped sending money to Sherry. (RT 121:4-8.) Sherry therefore filed the present paternity action in April of 1986. (Ex. 2.)

The foregoing establishes that Sherry did not single out some anonymous man, or even a man with whom she had a short fling, and sue him to establish his parentage of her daughter. Rather, Sherry and John were deeply involved in a serious relationship. Sherry did not bring a paternity action earlier, because she reasonably thought that John was going to marry her and to adopt Sabrina. Then, no one would ever have to know that Sabrina was the child of their extra-marital affair. Regardless of when John promised to adopt Sabrina, regardless of whether John ever acknowledged his biological fatherhood of Sabrina, and regardless of whether John ever asked Sherry not to sue him, the reality is that it would be

unreasonable to require her to have filed a paternity action against John any sooner than she did.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. PETITIONER DID NOT RAISE THE CONSITUTIONAL ISSUE IN A TIMELY FASHION BECAUSE HE DID NOT CHALLENGE THE BALANCING TEST, AND ARGUE THAT THE RATIONAL RELATIONSHIP TEST SHOULD BE USED INSTEAD, UNTIL AFTER HE HAD LOST IN THE CALIFORNIA COURT OF APPEAL.

The petition seeks review on the ground that the Court of Appeal used an incorrect test to determine whether California Evidence Code section 621 was constitutional as applied to the present facts. (Petition 10-16.) John attacks the Court of Appeal for using the balancing test articulated in *In re Lisa R., supra,* 13 Cal.3d 636; 119 Cal.Rptr. 475; 532 P.2d 123, which followed this Court's decision in *Stanley v. Illinois, supra,* 405 U.S. 645. (Petition p. 10.) As explained immediately below, petitioner did not challenge this test, nor argue that the rational relationship test should be used instead, until after he had lost in the Court of Appeal. Therefore, it should not be considered by this court now.

The trial court held that the application of Evidence Code section 621 to the present facts would deny due process. It resolved that issue by applying the balancing test articulated by the California Supreme Court in *In re Lisa R., supra,* 13 Cal.3d 636; 119 Cal.Rptr. 475; 532 P.2d 123. (Exhibits to Petition 387-394.) Petitioner did not challenge that approach in his petition for writ of mandate filed in the Court of Appeal. Rather, he argued that this

constitutional balancing test supported application of section 621 here. (Petition in the Court of Appeal 21:2-25:16.)

The Court of Appeal requested opposition. Sherry explained why this balancing test required a decision that the application of section 621 would violate due process on the present facts. Petitioner's reply brief did not dispute that the balancing test was the proper approach. (Petitioner's Reply Brief In Support Of Writ Petition 9:14-12:8.) The petition was denied by the Court of Appeal without opinion.

John then filed a petition for review in the California Supreme Court. He did not argue that the rational relationship test should be used instead of the balancing test. (Petitioner's First Petition For Review 14:17-16:20.)

The California Supreme Court granted review and transferred the matter to the Court of Appeal with instructions to issue an alternative writ. Sherry then filed a return to the alternative writ. She further explained why the balancing test of *Lisa R.* precluded the application of section 621 here on due process grounds. (Real Party's Return 28-43.) John filed a replication which did not challenge the balancing test. (Replication 1-8.) None of his many briefs cited any of the decisions on which he now relies for this argument.

The Court of Appeal issued its opinion affirming the trial court's decision on June 17, 1988. Only then did John file a petition for rehearing where he argued, for the first time, that the rational relationship test, rather than the balancing test, should be used to determine whether the application of section 621 would deny due process. (Petition For Rehearing 1-11.) The Court of Appeal denied the

petition for rehearing and the opinion therefore does not discuss John's untimely new argument.

This court should not grant certiorari to consider an issue which petitioner raised so late in the proceedings.

II. THE COURT OF APPEAL WAS CORRECT TO USE THE BALANCING TEST TO DECIDE THE DUE PROCESS ISSUE.

Petitioner's new position is that section 621 satisfies due process, if there is any rational basis on which its application can be sustained. (Petition 13-16.) He argues that the balancing test only applies when a fundamental right is being asserted. On petitioner's view, a child does not have a fundamental right to determine who her father is, or to seek child support from him. This is incorrect.

First, a child has no less of a fundamental right to know who her father is, than a father has to know who his child is. The only decision which petitioner cites in support of his assertion that a child does not have the same fundamental right as the father is *Louden v. Olpin*, 118 Cal.App.3d 565; 173 Cal.Rptr. 447 (1981). (Petition 12, fn 8.) That decision does not so hold. It only held that it is beyond the capacity of a court to force a parent to love his child and to spend time with her. At p. 568. Therefore, a child cannot bring an action against her father to compel visitation. *Ibid.* This is far from establishing that a child does not have a fundamental right even to know who her father is, and to obtain financial support from him.

Similarly, none of this court's decisions which petitioner cites supports, let alone compels, applying the rational relationship, rather than the balancing test, in the present case.

For example, in *Parham v. Hughes*, 441 U.S. 347 (1979), the father of an illegitimate child tried to recover damages for the child's wrongful death. Georgia law did not permit such an action. This Court upheld the Georgia statute against the father's equal protection challenges. At pp. 349-358. The father also claimed that the statute violated due process. This court rejected that contention, stating "nowhere in the appellant's brief or argument, however, is there any explanation of how the due process clause is implicated in this case." At p. 358.

The only decision cited by petitioner that involved a due process claim was *Stanley v. Illinois, supra*, 405 U.S. 645. There, this Court held that a father who had raised his illegitimate children was entitled to a hearing on his fitness as a parent, before the state could deprive him of custody over them. *Parham* distinguished *Stanley* on the ground that the father in *Parham* was only asserting the right to sue for money damages. At pp. 358-359.

In *Quilloin v. Walcott*, 434 U.S. 246 (1978) the father of an illegitimate child tried to prevent adoption by the mother's husband. He challenged a Georgia statute which allows adoption in this situation based on the consent of the mother alone. At pp. 248-249. This Court stated: "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." At p. 255. The biological father, however, was not seeking custody of the child.

In *Lehr v. Robertson*, 463 U.S. 248 (1983) the issue was whether the biological father had the right to notice, before his illegitimate child could be adopted. This Court held that due process was satisfied by a New York statute which gave him the right to register as the putative father. Since he had not done this, and since he had not

attempted to establish any relationship with his child, he was not entitled to notice. At pp. 263-265.

All of the other decisions cited by petitioner, which did apply the rational relationship test, involved economic legislation. (Petition 13-14.)

Petitioner's contention that the balancing test has only been applied in situations where a parent has tried to rebut the presumption of section 621, is also inaccurate. (Petition 10-11.) On the contrary, the balancing test is routinely applied where the presumption is challenged by either a parent or by a child.

For instance, in *Estate of Cornelious*, 35 Cal.3d 461; 198 Cal.Rptr. 543; 674 P.2d 245 (1984), the presumption was challenged on due process grounds in an action brought by a child. The court upheld the application of the presumption because the child's "private interests are simply not as weighty as those of the putative fathers in *Stanley* and *Lisa R.* who sought to care for and nurture their children." At p. 467. Although the result of the balancing test in *Cornelious* was to resolve it against the child, the court used the same test that the Court of Appeal did here.

In *Michelle W. v. Ronald W.*, 39 Cal.3d 354; 216 Cal.Rptr. 748; 703 P.2d 88 (1985), the presumption was challenged both by the putative father and by the child. Again, the court applied the same balancing test. Concerning the child's claim, the opinion stated: "In *Estate of Cornelious*, as in the case at bench, we apply a balancing test to resove an as-applied challenge to the statute in question." At p. 363. The court simply found that the statutory presumption did not deny the child due process on those facts.

Thus, no decision supports the conclusion that a balancing test is inappropriate when the issue is whether a presumption can constitutionally bar an action to establish paternity brought against an alleged biological father by the mother on behalf of the child.

III. APPLICATION OF CALIFORNIA EVIDENCE CODE SECTION 621 TO THE FACTS OF THIS CASE WOULD BE UNCONSTITUTIONAL.

The leading decision in this area, on which the Court of Appeal correctly relied to guide its analysis, is the decision by the California Supreme Court, *In re Lisa R., supra,* 13 Cal.3d 636; 119 Cal.Rptr. 475; 532 P.2d 123. There, the California Court established a balancing test to be applied for resolving constitutional challenges to presumptions regarding paternity based on marital status. See, also, *Michelle W. v. Ronald W., supra,* 39 Cal.3d 354 at p. 360; 216 Cal.Rptr. 748; 703 P.2d 88.)

In *Lisa R.,* two year old Lisa was adjudged a dependent ward of the court in 1969. At p. 640. She then lived with various foster parents. By 1973, when the trial court held a status review, both her mother and her mother's husband, had died. At pp. 640-642. A man claiming to be Lisa's biological father, who had seen her only a few times during the preceding five years, and not at all in the two years before the hearing, sought to prove that he was Lisa's father. The trial court refused to permit him to litigate the issue. The California Supreme Court reversed.

The issue was whether the man could prove that he was Lisa's father, in spite of the statutory presumption of former Evidence Code section 661. It provided that the child of a woman who was conceived during marriage, was presumed to be the legitimate child of that marriage.

This presumption could only be disputed by the state in a criminal action, by the child's mother or her husband, or by the descendant of one or both of them. A biological father could not dispute the presumption. As to him, "the presumption purports to be conclusive." At p. 647.

The California Supreme Court recognized that the situation raised due process and equal protection issues. It framed the issue as follows, in language which has been the basis for all subsequent California decisions in this area: whether it is constitutional to preclude a party from rebutting this kind of presumption about paternity must be resolved "by weighing the competing private and state interests" in each individual case. At p. 648.

The opinion then discussed the competing interests involved in the case before it. It held that on balance, the man claiming that he was Lisa's natural father had the right to rebut what otherwise would have been a conclusive presumption excluding him as Lisa's father. It first focused on the nature of the rights that he sought to vindicate.

In particular, the man claimed that Lisa had not been conceived as the result of a casual relationship. Rather, he had lived with Lisa's mother, both before and after Lisa's birth, and had contributed to Lisa's support. The opinion also mentioned other factors indicating that he had an interest in Lisa. The opinion then enumerated the State's potential interests. It found that none of them outweighed the father's interests.

First, although the State has a legitimate general interest in a child's welfare, that is not the factor to be considered in doing the balancing. Rather, the courts must measure the State's narrow interest in precluding evidence of parentage, against the private interests at

stake in establishing parentage. The question of the child's general welfare lies beyond the question of her parentage. At pp. 649-650.

In the present case, John has offered no reason to conclude that it would not be in Sabrina's best interest to establish a legal relationship with him, if he is her biological father. Indeed, this would be to Sabrina's benefit, because James is not her father and does not support her. She has had no relationship with James since she was very young. On the other hand, Sabrina developed a daughter/father relationship with John.

Moreover, as the trial judge noted, advances in medical science have made the diagnosis of genetically transmitted diseases much easier. (Ex. 393:3-5.) The State, and Sabrina, thus have this additional reason for determining who her biological father is.

Second, the State can have an interest in maintaining the presumption as a means of accomplishing the purposes of the juvenile court law. At p. 650. This does not exist in the present case.

Third, when *Lisa R.* was decided, the State had an interest in keeping a child from having the stigma of illegitimacy. At p. 650. In *Lisa R.*, this interest did not warrant the conclusiveness of the presumption. If the natural father established his paternity, he would legitimize the child as his own. *Ibid.*

This factor has no application in the present case, because the concept of illegitimacy has been removed from the law in California. *Michelle W. v. Ronald W., supra,* 39 Cal.3d 354 at p. 362; 216 Cal.Rptr. 748; 703 P.2d 88, held that in deciding whether a presumption concerning parentage is constitutionally being applied, the question of whether a child will be stigmatized as "illegitimate" is

irrelevant, because the Uniform Parentage Act (Cal. Civ. Code, §§ 7000, et seq., added by Stats. 1975, Ch. 1245, § 11, pp. 3196-3204) abolished the concept of illegitimacy. Insofar as section 621 was enacted to prevent children from being stigmatized as illegitimate, the Uniform Parentage Act "has rendered such a consideration to be without any legal effect." 39 Cal.3d 354 at p. 362, fn. 5. The opinion explicitly rejected the argument that the stigma of illegitimacy should be considered at all in determining the consitutionality of an application of section 621. *Ibid.* See also, legislative history at Ex. 118.

Fourth, the State has an interest in promoting marriage and in not impugning a family unit. This policy did not outweigh the claimed father's rights in *Lisa R.*, because the family unit had been dissolved by death. *Ibid.* Similarly, the family unit here was dissolved by the termination of Sherry's marriage to James. James has not maintained any relationship with Sabrina since 1982. Thus, this policy does not offset the interests of Sabrina and her mother in establishing John's parentage. If anything, it supports it, because John will legally become part of Sabrina's life.

As the trial judge pointed out, no decision which has upheld the application of the presumption against a constitutional challenge has involved an alleged biological father who sought to use it as a shield against his own paternity. (Ex. 359:25-360:6, 362:2-23.) Rather, they have involved attempts by the alleged biological father and/or the child, to assert paternity in the face of the presumption that the mother's husband was the father. Courts have not allowed such parties to rebut the presumption in these situations because to do so would disrupt the family unit of the presumed father.

By marked contrast, John's use of section 621 as a shield against his paternity cannot be justified by this logic. Indeed, John has offered no valid reason to justify allowing him to use the presumption defensively in this action.

Fifth, the State might assert an interest because the presumption promotes the efficiency of judicial inquiry. The Supreme Court held that on the facts in *Lisa R.*, considerations of efficiency could not outweigh due process rights. At pp. 650-651. In the present case, the advanced blood tests that are now available make it an easy matter to establish whether John is Sabrina's father. (See Cal. Evid. Code, § 895.5 which provides a presumption of paternity if the blood test shows a paternity index of 100 or greater.) James' non-parentage was established by blood tests and a final judgment long ago. Thus, the state's interest in efficiency is even less compelling here, than it was in *Lisa R.*

In summary, it would be at least as much a denial of due process to prohibit Sherry from rebutting the presumption of section 621, as it was not to allow the alleged father to rebut the presumption of former Evidence Code section 661 in *Lisa R.* The lower courts here engaged in precisely the kind of balancing test required by *Lisa R.* They correctly concluded that it would be unconstitutional not to allow Sherry to rebut the presumption. John cannot show that any State interests at all, let alone substantial ones, outweigh the private interests which Sherry is attempting to vindicate.

IV. IT IS NOT NECESSARY TO REACH THE CONSTITUTIONAL ISSUE BECAUSE THE RESULT IS CORRECT ON THE INDEPENDENT GROUND THAT JOHN CANNOT RELY ON THE PRESUMPTION OF EVIDENCE CODE SECTION 621 TO AVOID LITIGATING HIS PARENTAGE SINCE JAMES CONRAD WAS ADJUDGED NOT TO BE SABRINA'S FATHER.

A. Blood Tests Done Before Sabrina's Second Birthday Established That It Was Impossible For James To Be Her Father, And A Binding Judgment So Providing Was Entered As Part Of James And Sherry's Marital Dissolution.

A blood test of James done in 1974 showed that his blood type was AB. (Ex. 15.) A blood test of Sabrina dated August 5, 1981, showed that her blood type was O. (Ex. 16.) Thus, blood tests done before Sabrina was two years old conclusively established that it was impossible for James to be her father. (Ex. 13:6-9.)

James filed for dissolution of his marriage to Sherry when Sabrina was less than 16 months old. It was unnecessary for James to initiate other litigation to raise the parentage issue by court ordered blood tests. Rather, the existing blood typing revealed that James absolutely could not be Sabrina's father.

James and Sherry therefore provided in their Marital Settlement Agreement that James was not Sabrina's natural father. (Ex. 18, ¶1B.) Since James was not Sabrina's father, custody was awarded to Sherry, and no provision for support or visitation by James was made. (Ex. 19, ¶¶2-3.) These agreements became court orders, when their Marital Settlement Agreement was incorporated into the judgment dissolving their marriage. (Ex. 17.)

As a result, there is a judgment that James is not Sabrina's father which is entitled to full effect, in the

absence of extrinsic fraud or mistake which has never been alleged, and did not exist, here. *Zastrow v. Zastrow*, 61 Cal.App.3d 710, 713-714; 132 Cal.Rptr. 536 (1976); *Giovannoni v. Giovannoni*, 122 Cal.App.3d 666, 669-670; 176 Cal.Rptr. 154 (1981). See also *Brown v. Superior Court*, 98 Cal.App.3d 633, 636; 159 Cal.Rptr. 604 (1979) [determination of paternity in default dissolution entitled to res judicata effect absent extrinsic fraud or mistake].

The judgment that James is not Sabrina's father is thus conclusive. As a result, the presumption in section 621 that James is Sabrina's father has been rebutted. It is unavailable as a defense for John in the present proceeding.

If James had challenged his parentage of Sabrina, and if this issue had been fully resolved before she turned two, it would be absolutely impossible for John to defend against the present paternity action by relying on the presumption in section 621. It is only because the judgment in the dissolution action was entered after Sabrina turned two, that John even had a colorable argument that it is not binding on him now. That issue is discussed immediately below.

B. The Procedure James And Sherry Followed Was Sufficient To Rebut The Presumption Of Evidence Code Section 621.

Section 621 permitted James to rebut the presumption that he was Sabrina's father by the results of blood tests. If the blood tests had to be compelled by court order, a motion to obtain them had to be made before Sabrina was two years old. Nothing in section 621 requires the blood test of the presumed father to be performed after the child's birth, or pursuant to a court

order. Ordinarily, all of the tests will have to be done after the birth, because an HLA tissue typing test will be necessary to rule out the mother's husband as having been the child's father. In the present case, James' blood type (AB) was incompatible with Sabrina's blood type (O). This information established the impossibility of his parentage.

The blood tests on which the judgment was based were obtained before Sabrina was two years old. James and Sherry also separated, and James filed for dissolution, considerably before Sabrina's second birthday. It is of no consequence that the judgment in the marital dissolution action was entered shortly after Sabrina's second birthday, for the following reasons.

If Sherry had not agreed that James was not Sabrina's father based on the previous blood tests, James would have been forced to litigate the issue. Even if he had filed a motion for blood tests within two years of Sabrina's birth, the judgment declaring that he was not Sabrina's father most likely would not have been entered until after Sabrina turned two.

It would be absurd to interpret the statute to require litigation regarding the husband's parentage to be concluded before the child is two. In order to comply with such a requirement, an action to dispute parentage would have to be filed long before the child was two. The important time must be when the blood tests were taken, not when the issue of paternity is litigated in court, or finally resolved.

A rule against what James and Sherry did would also be poor social policy because it would require unnecessary litigation. Sherry and James properly agreed to what was the necessary reality within the context of their

pending dissolution action, instead of litigating the issue. They saved judicial time, and expense to both themselves and the courts, by not making idle and frivolous motions.

Contrary to petitioner's suggestion, no public policy was offended by the resolution of this issue in Sherry and James' dissolution judgment. (Petition p. 17, fn. 10.) Neither *In re Marriage of Ayo*, 190 Cal.App.3d 442; 235 Cal.Rptr. 458 (1987) nor *In re Marriage of Goodarzirad*, 185 Cal.App.3d 1020; 230 Cal.Rptr. 203 (1986), precludes what happened here. Neither of those cases involved a situation where the parents agreed that the man was not the father based on what blood tests conclusively established. *Ayo* involved an attempt by a man to avoid paying support for a child he had adopted. *Goodarzirad* involved a father who tried to avoid his child support obligation by giving up all rights to visitation in exchange for a release of the duty to support his child.

There is no evidence which suggests that what Sherry and James did was an attempt to circumvent James' obligation to support Sabrina. Since James was not Sabrina's father, he had no such obligation. James willingly supported Alexis, who was his child. James and Sherry adopted a sensible method of avoiding litigation over Sabrina's parentage, by stipulating to what necessarily would have been the result of such litigation.

John therefore argued that the judgment only determined that James was not Sabrina's natural father, and that this was insufficient to establish that he was not presumed to be Sabrina's legal father under section 621. (Ex. 292-293, Reply Brief 4:5-6:1.) This is incorrect. Section 621 does not distinguish between two types of fathers. When a presumed father rebuts the presumption of section 621 by showing through blood tests that he is not the

child's natural father, and obtains a judgment to that effect, the whole point is that he is no longer the child's legal father. Thus, the effect of the dissolution judgment was to determine that James had no parental status at all.

John further revealed his confusion by contending that to permit what Sherry and James did in their dissolution action would result in great unfairness by shifting responsibility for support to third parties, or to the state. (Reply Brief 6:23-26.) Not so. The unfairness would be to require James to support a child whom he did not father, and to allow John to escape from supporting the child whom he did father. Moreover, the fact that John cannot avoid this litigation by hiding behind the presumption of section 621, does not necessarily mean that he automatically will have to support Sabrina. Sherry must still establish that John is Sabrina's father.

C. It Would Not Matter If James Raised The Issue Of His Parentage In The Dissolution Action During The Month After Sabrina Turned Two Years Old.

The record does not reflect exactly when, during the pendency of James and Sherry's marital dissolution action, the question of James' parentage was first raised. It appears that James raised the issue sometime during the summer of 1983, and that it was resolved at a meeting in August 1983. (RT 115:23-116:6.) Sabrina turned two on July 30, 1983.

John therefore argued below that James did not "raise the issue" within the two years provided by section 621. (Ex. 378:24-380:21.) John also sought to undermine the force of the prior judgment by noting that both James' petition for dissolution of marriage, and Sherry's

response, asserted that Sabrina was a child of their marriage. (Ex. 58, 60.) These facts do not undermine the validity of the judgment declaring that James is not Sabrina's father, for the following reasons.

The predicate for John's argument is that the two year provision in section 621 operates as a statute of limitations for the mother's husband to rebut his presumed parentage. (Ex. 379:15.) This requires the conclusion that even if James raised the issue in the dissolution proceeding after Sabrina turned two, it would have been considered timely over Sherry's objection, because of numerous rules governing the operation of statutes of limitation.

First, James filed the dissolution action well before Sabrina's second birthday. He listed Sabrina as a child of the marriage because that was what he believed. When the true facts later came to light, James could have amended his petition to allege that Sabrina was not his child. Under California law, this amendment would have related back to the date that James' original petition for dissolution had been filed, for the purpose of satisfying the statute of limitations. See discussion in 5 Witkin, *California Procedure* [3d ed. 1985], Pleading § 1108, p. 526 [law governing civil actions applies to amendment of pleadings in marital litigation], Pleading § 1115, p. 532 [amendments generally relate back to date of filing original pleading for purpose of statute of limitations], Pleading § 1121, p. 537 [amendments are liberally allowed to correct allegations made by mistake], Pleading § 1125, p. 541 [amendment contradicting an admission in original pleading allowed on a showing of mistake], Pleading § 1162, pp. 579-581 [modern view allows amendment

even to change cause of action if it relates to the same general set of facts].

Second, there is no question but that James had the right to rebut the presumption of section 621 in the course of his dissolution action, simply by producing blood tests which showed that he could not be Sabrina's father. Cal. Evid. Code, § 621, subd. (c). If Sherry had objected that James was raising the issue too late, he would have been able to invoke the doctrine of estoppel.

James thought that Sabrina was his child when he filed for dissolution. Sherry's response did not dispute this. Under these circumstances, when James learned the truth soon after Sabrina turned two, the statute of limitations could not be invoked to deprive him of the right to establish his non-parentage. See 3 Witkin, *California Procedure* [3d ed. 1985] Actions, §§ 530-531, pp. 559-560 [statute does not run when the plaintiff is kept in ignorance of facts crucial to his claim].

In view of the valid judgment determining that James is not Sabrina's father, the presumption of section 621 simply falls out of the picture. The present situation is the same as if Sabrina had been born out of wedlock, and Sherry brought this action to determine that John is Sabrina's father. There is no requirement that such an action be commenced against John before Sabrina turned two. See *Perez v. Singh*, 21 Cal.App.3d 870, 872; 97 Cal.Rptr. 920 (1971) [paternity action brought when child was teenager timely because mother acts for the child and the statute of limitations is tolled during the minority of a child].

Thus, the trial court's ruling that John submit to blood tests can be upheld, without even reaching the constitutional issues.

V. CALIFORNIA EVIDENCE CODE SECTION 621 IS UNCONSTITUTIONAL FOR TWO ADDITIONAL REASONS, WHICH THE COURT OF APPEAL DID NOT HAVE TO REACH.

A. The Statute Violates Equal Protection Principles Because It Irrationally Discriminates Between Men And Women Regarding How The Presumption Of The Husband's Parentage Can Be Rebutted.

Originally, the presumption of section 621 could not be rebutted with blood test evidence by either the child's mother or the mother's husband. The California Legislature perceived the inequity in this situation and amended the statute in 1980 to allow the husband, but not the wife, to rebut the presumption by blood test evidence. (See Ex. 127-131, Legislative History lodged with the Court of Appeal by petitioner.) The Legislature then recognized that this was disparate treatment of the spouses. *(Ibid.)* Therefore, at the beginning of the next legislative session, the author of the 1980 amendment introduced a bill which amended section 621 to permit the mother to rebut the presumption by evidence of blood tests. *(Ibid.)*

This amendment still leaves an equal protection violation. In addition to blood tests, the mother must submit an affidavit acknowledging paternity from the person whom she believes is the child's biological father. Cal. Evid. Code, § 621, subd. (d). The father can rebut the presumption by blood tests, without meeting any additional requirements. Cal. Evid. Code, § 621, subd. (c).

Section 621 therefore unquestionably treats the male and female partners to a marriage differently, regarding how each of them can rebut the presumption that the

husband is the father of a child born during their marriage. John relied on this difference to argue that Sherry cannot rebut the presumption of section 621 because she has not, and cannot, obtain the requisite affidavit from him. (Petition in Court of Appeal 17:11-14.)

Classifications based on sex are suspect, especially when they involve a fundamental interest. Therefore, to justify such disparate treatment, the state must show "a compelling" interest. *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). No compelling state interest exists in the present situation. The equities are precisely to the contrary.

When the husband rebuts the presumption of his paternity solely by evidence of blood tests, this leaves the child without a father, and without a source of child support from a man, unless someone establishes who the child's real father is. The husband is not required to assure that such a person is found. There is no reason to impose this additional burden on the mother. Indeed, its imposition is especially unreasonable in a situation where, as here, the person whom the mother believes is the child's father refuses even to take a blood test.

John argued that the additional burden placed on the mother to obtain an affidavit from the alleged biological father is justified by the fact that she is challenging another person's parentage, not her own. (Reply Brief 13:3-14.) While John has pointed to a difference between an action between the mother and the presumed father, it is not a difference which is at all rationally related to the additional requirement. There is no reason why the father, just because he is challenging his own paternity, should not have to come forward with an affidavit from the alleged biological father. If anything, it would make

more sense to require this of him than of the mother, since he would be trying to avoid his own financial responsibility.

The statute arbitrarily and capriciously distinguishes between the sexes without any rational basis, let alone a compelling state interest. The trial court correctly perceived that this disparate treatment made the statute subject to an equal protection challenge. (Ex. 334:10-335:17, 390:26-392:10.)

B. The Statute Is Unconstitutional Insofar As It Requires The Presumption To Be Rebutted Within Two Years.

In *Michelle W. v. Ronald W., supra,* 39 Cal.3d 354; 216 Cal.Rptr. 748; 703 P.2d 88, the California Supreme Court suggested that a two year statute of limitations within which to rebut the presumption may not be adequate to satisfy due process concerns. At p. 358, fn.1, citing this Court's decision in *Mills v. Habluetzel,* 456 U.S. 91 (1982). The California Supreme Court did not reach that issue, because the statute was not challenged on this basis in *Michelle W.* Recently, in *Clark v. Jeter, supra,* ___ U.S. ___; 108 S.Ct. 1910; 100 L.Ed.2d 465, this court held that Pennsylvania's six year statute of limitations within which to file a paternity action was unconstitutional. Sherry submits that the two year statute of limitations in California Evidence Code section 621 is also unconstitutional.

It must be remembered that what is ultimately at stake in a paternity action is the minor child's right to have her real father identified and their relationship established. Thus, the mother essentially is prosecuting the action on behalf of her child. *Perez v. Singh, supra,* 21

Cal.App.3d 870, at p. 872; 97 Cal.Rptr. 920. It is for this reason that no statute of limitations exists for bringing a paternity action under the Uniform Parentage Act. *Ibid.* Moreover, under California Code of Civil Procedure section 352, a minor's cause of action is tolled during the child's minority. *Jessica H. v. Allstate Ins. Co.*, 155 Cal.App.3d 590, 594-596; 202 Cal.Rptr. 239 (1984) [the general tolling of statutes of limitation for minors supercedes any specific statute of limitations which might otherwise terminate a child's rights].

Thus, to the extent that Sherry is suing to vindicate rights which really belong to Sabrina, the obstacle of a two year statute of limitations unfairly deprives Sabrina of due process and should be declared unconstitutional.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

Dated: November 28, 1988

Respectfully submitted,

DE GOFF AND SHERMAN
Counsel for Respondent In The United States Supreme Court

By RICHARD SHERMAN

No. 88-709

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

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United States

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MARIN,
Respondent,

SHERRY DOE,
Real Party in Interest.

On Writ of Certiorari to the California Court of Appeal, First Appellate District, Division 4

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In her Brief in Opposition, Real Party in Interest makes several contentions which challenge the Court's jurisdiction to hear this matter. As Petitioner will explain, these contentions are incorrect. The Court should grant the Petition for Writ of Certiorari, to consider this case in light of *Michael H. and Victoria D. v. Gerald D.*

I

PETITIONER PROPERLY AND TIMELY RAISED THE CONSTITUTIONAL ISSUE

Real Party in Interest first contends, at pages 10-12 of her Brief, that Petitioner did not raise the constitutionality of Evidence Code section 621 in a timely fashion. This contention must be questioned on its own merits, since Real Party, and not

Petitioner, has claimed that Evidence Code section 621 is unconstitutional. Petitioner has always maintained that the statute is both constitutional and dispositive of this controversy.

In any event, the record reveals that Petitioner has argued the constitutionality of this legislation from the very outset of this case. Both the trial judge and the Court of Appeal have discussed the constitutional issue in great detail. Petitioner has set forth the seminal holdings of these Courts in his Petition.

Real Party nonetheless claims that Petitioner did not specifically urge application of a rational relationship standard of constitutional review until after the Court of Appeal issued its opinion. Real Party's argument is inaccurate, since Petitioner argued the inapplicability of a strict scrutiny balancing test standard long before the Court of Appeal filed its opinion which is the subject of this Petition. For example, Petitioner specifically wrote, at page 10, lines 7-10 of his Reply Brief in Support of Writ Petition, filed September 4, 1987, the "The balancing test does not apply to a claim by a mother like [Real Party in Interest], since Evidence Code section 621(d) affords her a statutory remedy."

In sum, Petitioner has timely raised, and properly preserved, the constitutional issues.

II

REAL PARTY IN INTEREST DID NOT COMPLY WITH THE STATUTE

Real Party also suggests that this case may be resolved without reaching the constitutionality of Evidence Code section 621, based upon the fact that Real Party possessed blood typing, taken before the child in question was two years old, which allegedly excluded the paternity of her husband James. Petitioner has already responded to this argument at Pages 5-6, footnote 2 of this Petition.

As Petitioner noted, Real Party did not comply with the requirements of Evidence Code section 621, nor did she ever explain to the court why she had failed to do so. Accordingly, both the trial court and the Court of Appeal based their decisions

exclusively on the constitutionality of the code section. Only the constitutional question is before this Court, since Real Party did not utilize her available statutory remedy.

III

THE CALIFORNIA LEGISLATURE HAS RESOLVED THE POLICY ISSUES WHICH REAL PARTY SEEKS TO RAISE AS CONSTITUTIONAL QUESTIONS

Real Party in Interest raises numerous public policy issues in support of her position that Evidence Code section 621 is unconstitutional. Primary among these issues are her assertions that (1) the child should have a right to know the identity of her biological father, and (2) the biological father should be paying child support. Both of these positions assume, without any evidentiary record, that someone other than James Conrad is the child's biological father.

Petitioner has addressed these matters in the Petition, where he discussed the fact that Evidence Code section 621 is consistent with public policy. In addition, as Petitioner wrote, the Legislature considered at length the important underlying social issues when it enacted the current form of the statute. Petitioner submits that the Legislature reached an appropriate resolution, which is well within the limitations of constitutional due process.

CONCLUSION

Petitioner respectfully requests that the Court grant certiorari.

DATED: December 8, 1988

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